ERIC

THE
ERISA
INDUSTRY
COMMITTEE

MAR 31 2000

March 31, 2000

BY HAND

Secretary, Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313 – Comment

Ladies and Gentlemen:

We are pleased to submit the comments of The ERISA Industry Committee ("ERIC")[1] on the Commission's proposed privacy Rule under Section 504 of the Gramm-Leach-Bliley Act (the "G-L-B" Act or the "Act") (Pub. L. No. 106-102). When the Commission issued the proposed Rule, it asked that comments be submitted by March 31, 2000.[2]

Background

Subtitle A of Title V of the G-L-B Act restricts a financial institution's ability to disclose nonpublic personal information about a consumer to nonaffiliated third parties, and requires a financial institution to disclose to the institution's customers the institution's privacy policies and practices regarding information sharing with both affiliates and nonaffiliated third parties.

[1] ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

[2] *See* 65 Fed. Reg. 11174 (March 1, 2000).

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<u>Comments</u>

1. <u>The Commission should amend the proposed Rule to exclude employer-sponsored employee benefit plans from the Rule</u>.

There is no evidence to suggest that Congress intended to regulate employee benefit plans when it enacted the G-L-B Act. To the contrary, both the text and the legislative history of the Act indicate that Congress contemplated that the Act would regulate enterprises that are in the business of engaging in financial activities.

Section 509(3) of the Act defines a "financial institution" as "any institution *the business of which* is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956" (emphasis added).[3] The preamble to the proposed Rule emphasizes that the definition of "financial institution" encompasses a broad spectrum of businesses.[4] Under § 4(k), "financial activities" include a number of activities commonly engaged in by employee benefit plans in the course of providing benefits to employees, including safeguarding money or securities, indemnifying against illness, disability, or death, or providing and issuing annuities.

Employee benefit plans, however, cannot be considered to be in the "business" of engaging in financial activities. Employee benefit plans are simply the entities through which employee benefits are provided. Because employee benefit plans are not engaged in "business," they do not qualify as financial institutions within the meaning of the G-L-B Act.[5]

The text of the G-L-B Act shows that Congress intended to *distinguish* between financial institutions and the employee benefit plans that they administer. Section 201 of the Act provides that a bank is not considered a broker merely because the bank effects transactions, as part of its transfer agent activities, in the

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[3] This definition is incorporated in the proposed Rule. *See* Prop. Rule § 313.3(j)(1).

[4] 65 Fed. Reg. 11174, 1176 – 77.

[5] The "other persons" to whom the proposed Rule applies are "third parties that are not financial institutions, but that receive nonpublic personal information from financial institutions with whom they are not affiliated." *See* Prop. Rule § 313.1(b).

securities of the issuer, as part of any employee benefit plan of the issuer or its affiliates if the bank does not solicit transactions or provide investment advice regarding the purchase or sale of securities in connection with the plan. Similarly, § 207 of the Act defines a "qualified investor" to include any employee benefit plan within the meaning of ERISA *if* investment decisions are made by a plan fiduciary which is a bank, savings and loan association, insurance company, or registered investment adviser. These provisions establish that Congress viewed employee benefit plans as the *customers* of financial institutions, not as financial institutions themselves. The legislative history of the G-L-B Act contains not the slightest suggestion that Congress intended to treat employee benefit plans as financial institutions.

Congress has separately regulated employer-sponsored employee benefit plans, recognizing that such plans have distinctive objectives and operations that differ markedly from those of business enterprises and financial institutions. Employer-sponsored employee benefit plans are comprehensively regulated by the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[6] ERISA regulates employer-sponsored –

(1) pension plans, such as defined benefit pension plans, profit-sharing plans, retirement savings plans, and § 401(k) plans, and

(2) welfare plans, such as health and life insurance plans, disability plans, and severance plans.[7]

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."[8] The Supreme Court has relied on ERISA's comprehensive regulation of pension plans to conclude that noncontributory, compulsory pension plans are not subject to the federal securities laws:

> "In *Teamsters v. Daniel*, 439 U.S. 551 (1979), we held that a noncontributory, compulsory pension plan was not a security. One of our reasons for our holding in *Daniel* was that the pension plan was regulated by the Employee Retirement

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[6] 29 U.S.C. §§ 1001 et seq.

[7] *See* ERISA §§ 3(1) – 3(3), 29 U.S.C. §§ 1002(1) – 1002(3).

[8] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting Shaw *v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983)).

> Income Security Act of 1974 (ERISA): 'The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pension plans.' *Id.* at 569-570. Since ERISA regulates the substantive terms of pension plans, and also requires certain disclosures, it was unnecessary to subject pension plans to the requirements of the federal securities laws as well."[9]

Likewise, ERISA's fiduciary responsibility,[10] reporting and disclosure,[11] and record keeping[12] requirements, the confidentiality requirements imposed by the Department of Labor's regulation under ERISA § 404(c),[13] and the privacy standards being promulgated by the Department of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") (Pub. Law No. 104-91)[14] strongly counsel against applying the Act's privacy and notification requirements to employer-sponsored employee benefit plans in the absence of a clear direction from Congress to do so.

The comprehensive regulatory regime created by ERISA and HIPAA, together with the case law referred to above, demonstrate that when Congress has intended to regulate employee benefit plans, Congress has made its intention clear. Since Congress has not expressed any intention to regulate employee benefit plans under the G-L-B Act, the Commission should exempt employee benefit plans from the proposed Rule.

Moreover, ERISA sharply distinguishes employee benefit plans from the institutions that manage them. Under ERISA, an employee benefit plan is a

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[9] *Marine Bank v. Weaver,* 455 U.S. 551, 558 n.7 (1982).

[10] ERISA §§ 401-14, 29 U.S.C. §§ 1101-1114.

[11] ERISA §§ 101-11, 29 U.S.C. §§ 1021-1031.

[12] ERISA §§ 106, 107, 209, 29 U.S.C. §§ 1026, 1027, 1059.

[13] 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4)(vii).

[14] *See* 64 Fed. Reg. 59917 – 60065 (Nov. 3, 1999).

separate legal entity that may sue or be sued.[15] ERISA generally requires the assets of a plan to be held either (1) in trust by a trustee or (2) by an insurance company pursuant to an insurance contract. Similarly, under ERISA, plan assets must be managed either by the trustee, by an investment manager, or by a named fiduciary.[16] In addition, ERISA classifies those who exercise discretion or control over plan administration or plan assets as plan fiduciaries and classifies those who provide services to a plan as service providers.[17] Thus, there is a clear distinction under ERISA between employee benefit plans and the institutions that manage and provide services to plans.

If the Rule is applied to employee benefit plans, participants and beneficiaries will suffer the consequences. When new regulatory requirements impose additional administrative costs on employee benefit plans, the additional costs are borne by plan participants and beneficiaries. Such cost-shifting occurs either directly (as in the case of a § 401(k) plan, where plan administrative expenses are charged directly against participants' account balances) or indirectly (as in the case of a plan financed entirely or partly by participant contributions). Even where the employer initially pays for any additional plan administration costs, participants and beneficiaries ultimately will bear those costs. The amount an employer can spend on employee benefits is limited, and if the employer is required to spend more on plan administration, the employer will compensate for the increase in administrative cost by reducing the amount it spends on the benefits that participants and beneficiaries receive. The result will be reduced benefits for participants and beneficiaries, greater required participant contributions, or both.

2. <u>The Commission should revise the proposed Rule to provide that, in its capacity as the sponsor of an employee benefit plan, an employer is not subject to the proposed Rule</u>.

Both ERISA and the decided case law sharply distinguish the employer from the employee benefit plans that the employer sponsors. They recognize that an employee benefit plan is a legal entity, separate and apart from

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[15] ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1).

[16] *See* ERISA §§ 402, 403, 29 U.S.C. §§ 1102, 1103.

[17] *See* ERISA §§ 3(14)(A) & (B), 3(21), 29 U.S.C. §§ 1002(14)(A) &(B), 1002(21).

the employer, and that an employer-sponsor acts in a "settlor" capacity that differs from that of the plan.[18]

An employer that sponsors a benefit plan for its own employees cannot be considered to be in the business of "engaging in financial activities" solely because of it sponsorship of the plan. An employer is not "in the business" of engaging in financial activities merely because it offers benefits to its own employees. A contrary conclusion would cause millions of employers to be treated as "financial institutions" under the G-L-B Act, contrary to the intent of Congress and, we trust, contrary to the intent of the Commission. Accordingly, an employer cannot be treated as a "financial institution" merely because it sponsors employee benefit plans for its own employees and must not be subject to the proposed Rule.

We appreciate the opportunity to comment on the proposed Rule, and hope that our comments will be helpful to the Commission. If additional information or analysis would assist the Commission, please let us know.

Sincerely,

Mark J. Ugoretz
President

[18] *See* ERISA §§ 3(14), 502(d)(1), 29 U.S.C. §§ 1002(14), 1132(d)(1); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442 – 46 (1999).